

Message Text

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PAGE 01 STATE 025079

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FM SECSTATE WASHDC

TO AMEMBASSY NAIROBI PRIORITY

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E.O. 11652: N/A

TAGS: EFIN

SUBJ: OPIC: ATWELL DEVELOPMENT CO. AND MARISCHAL TEA ESTATE

REF: NAIROBI 0916

1. ATWELL DOES NOT AT THIS TIME HAVE BASIS FOR CONVERTIBILITY CLAIM UNDER OPIC CONTRACT OF GUARANTY NO. 5715 BASED ON PRESENT FACTS. OPIC CONTRACT GUARANTIES TRANSFER INTO UNITED STATES DOLLARS AMOUNTS OF LOCAL CURRENCY RECEIVED DURING THE GUARANTY PERIOD AS RETURN OF CAPITAL, WHICH MEANS THE ACTUAL KENYA SHILLINGS RECEIVED AS THE RESULT OF THE SALE OF THE INVESTMENT; PROVIDED THE CASH HAS NOT BEEN HELD BY THE INVESTOR FOR MORE THAN EIGHTEEN MONTHS AND THE INVESTOR IS PREVENTED BY GOK FROM EFFECTING TRANSFER OF SUCH LOCAL CURRENCY INTO U.S. DOLLARS FOR THE REASONS SPECIFIED THEREIN. ACORDING TO OUR INFORMATION, ATWELL HAS ONLY ENTERED INTO AN AGREEMENT FOR THE SALE OF MARISCHAL ESTATE CONTINGENT UPON RECEIVING CONSENT FROM THE GOK PURSUANT TO KENYAN LAW FOR THE TRANSFER OF THE INVEST-

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PAGE 02 STATE 025079

MENT TO A NONCITIZEN. SINCE NO LOCAL CURRENCY HAS BEEN RECEIVED

AND WILL NOT BE RECEIVED UNTIL THE SALE OF THE INVESTMENT IS CONSUMMATED, ATWELL'S INCONVERTIBILITY CLAIM IS PREMATURE.

2. TO REASSURE ATWELL REGARDING OPIC COVERAGE, EMBASSY MAY WISH TO ADVISE HIM THAT PRESENT SITUATION IN NOT BEING ABLE TO SELL ESTATE COULD DEVELOP INTO AN EXPROPRIATION CLAIM. SECTION 1.15 OF THE CONTRACT AS AMENDED; DEFINES EXPROPRIATORY ACTION AS "ANY ACTION WHICH IS TAKEN, AUTHORIZED, RATIFIED OR CONDONED BY THE GOVERNMENT OF THE PROJECT COUNTRY, ... , AND WHICH FOR A PERIOD OF ONE YEAR DIRECTLY RESULTS IN PREVENTING: ... (C) THE INVESTOR ... FROM DISPOSING OF A SUBSTANTIAL PORTION OF THE ASSETS OF THE FOREIGN ENTERPRISE: ..." HOWEVER, NOTE CAVEAT IN SECTION 1.15 REQUIRING THE INVESTOR TO TAKE ALL REASONABLE MEASURES TO PREVENT OR CONTEST SUCH ACTION. ATWELL'S EXPROPRIATION CLAIM, IF FILED, WOULD ALSO BE PREMATURE AT THE PRESENT TIME BECAUSE OF THE FOLLOWING:

(A) ATWELL HAS NOT ALLOWED A REASONABLE TIME FOR THE PROCESSING OF THE PURCHASER'S APPLICATION FOR PRESIDENTIAL CONSENT FOR THE TRANSFER OF THE INVESTMENT TO A NONCITIZEN.

(B) ATWELL HAS THE ALTERNATIVE TO SELL THE INVESTMENT ON REASONABLE COMMERCIAL TERMS TO A KENYA CITIZEN WHICH DOES NOT REQUIRE PRESIDENTIAL CONSENT FOR THE TRANSFER OF THE INVESTMENT TO A NONCITIZEN.

3. SUGGEST EMBASSY DO THE FOLLOWING IF APPROPRIATE.

(A) ADVISE ATWELL OF ABOVE.

(B) DETERMINE FROM ATWELL WHETHER THE PURCHASER, WHO IS RESPONSIBLE FOR OBTAINING PRESIDENTIAL CONSENT, IS IN FULL COMPLIANCE WITH THE PROCEDURE IN APPLYING FOR AN EXEMPTION UNDER KENYA LAW.

(C) DETERMINE FROM ATWELL WHAT MEASURES ARE BEING TAKEN BY THE PURCHASER IN OBTAINING SUCH EXEMPTION.

(D) OBTAIN FROM THE GOK THE AVERAGE TIME NECESSARY LIMITED OFFICIAL USE

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PAGE 03 STATE 025079

FOR THE PROCESSING OF APPLICATIONS FOR OBTAINING PRESIDENTIAL CONSENT IN THE TRANSFER OF DEVELOPED LAND TO NONCITIZENS.

(E) SEND FOLLOW-UP LETTERS TO MINISTERS OF AGRICULTURE, LANDS AND SETTLEMENT, AND FINANCE.

4. DOES EMBASSY BELIEVE IT WOULD BE APPROPRIATE AT THIS TIME TO ADVISE OFFICIALS OF GOK THAT ATWELL HAS OPIC INSURANCE

COVERAGE AND THAT UNREASONABLE REFUSAL IN GRANTING APPLICATION
FOR EXEMPTION REGARDING SALE TO ATWELL COULD CONSTITUTE AN
EXPROPRIATORY ACTION UNDER OPIC CONTRACTS?

5. FYI: A BONA FIDE EXPROPRIATION CLAIM COULD HAVE AN EFFECT
ON OPIC'S PROGRAM IN KENYA BY DISCOURAGING INVESTMENTS ALTHOUGH
IT WOULD BE PREMATURE TO REACH SUCH CONCLUSION AT THIS TIME.
END FYI. DECON 2/6/75. KISSINGER

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